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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DELBERT MARIO SANCHEZ, JR.,

Defendant and Appellant.

E044401

(Super.Ct.No. RIF102437)

OPINION

APPEAL from the Superior Court of Riverside County. W. Charles Morgan,
Judge. Affirmed.

Richard de la Sota, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and
Pamela Ratner Sobeck, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Delbert Mario Sanchez, Jr., came into his ex-girlfriend's bedroom and
asked to use her phone. The victim, Ricardo Ramirez, was staying with the ex-girlfriend

temporarily. Ramirez not only objected, but started punching defendant. When the ensuing fistfight ended, defendant was victorious; Ramirez was on his knees on the floor. Nevertheless, defendant drew a gun and shot him in the back three times, killing him.

Defendant's first trial resulted in a conviction for second degree murder. (Pen. Code, § 187, subd. (a).) On appeal, we reversed, holding that, when the jury announced that it was deadlocked, the trial court gave it erroneously coercive instructions.

Defendant was retried and convicted again of second degree murder. An enhancement for personally discharging a firearm and causing death was found true. (Pen. Code, § 12022.53, subd. (d).) He was sentenced to 40 years to life.

In this appeal, defendant contends:

1. The trial court erred by admitting a recorded conversation in which defendant recommended "smash[ing]" people who were "running their mouth"
2. The trial court erred by instructing that an assault with fists does not justify the use of a weapon in self-defense unless the person assaulted reasonably believes that the assault is likely to inflict great bodily injury. (CALJIC No. 5.31.)

We find no reversible error. Accordingly, we will affirm.

I

FACTUAL BACKGROUND

A. *Solorzano's Account of the Shooting.*

Christina Solorzano was present during the shooting. She lived in an apartment in Banning. Her boyfriend, Richard Quintanilla, also lived there; at all relevant times,

however, he was in jail. Ricardo Ramirez, a long-time friend, was staying with Solorzano temporarily.

On March 8, 2002, Solorzano was asleep in her bedroom when defendant woke her up by coming in, turning on the light, and asking if he could use her phone. She had known defendant for years; she had had sexual relations with him “off and on” Moreover, defendant’s sister was her best friend. Defendant and Ramirez had never met before.

At that point, Ramirez came into the bedroom. He told defendant to use the phone outside. Defendant said, “[N]o, I’m going to use it right here.” Ramirez then punched defendant twice. Defendant fought back; fists started “flying” At one point, defendant was outside the bedroom door, trying to push it open, while Ramirez was inside, trying to push it closed. Later, the door was found ripped off its hinges.

When the fight stopped, Ramirez was on his knees on the bedroom floor, just inside the doorway, looking out. Solorzano leaned forward and followed his gaze; she saw defendant in the hallway, pointing a gun. She yelled several times, “Delbert, don’t shoot.” She then covered her face with her hands. She heard shots.

When Solorzano opened her eyes, defendant was gone and Ramirez was lying on the floor. Ramirez crawled or dragged himself toward the hallway, then stopped. His dead body was found lying face down, mostly in the hallway, but with his lower legs still inside the bedroom. He had been shot three times in the back. All of the bullets were .32 caliber, and all had been fired by the same gun.

When the police first interviewed Solorzano, she lied and said she did not know who shot Ramirez. About four days later, the police contacted her again. This time, she told them the truth.

B. *Defendant's Statements Following the Shooting.*

On March 13, 2002, defendant was found in the company of one Ernesto Mendez. They were both arrested. While they were in a room together, they had a conversation that was recorded. In it, Mendez threatened to "take [Solorzano]'s bitch ass out" Defendant then said:

"[DEFENDANT]: . . . I should have just did her right there. . . .

"[MENDEZ]: You capped him when you walked up . . . my heart started pumping. I thought, 'He really shot him!' I was like, whoa! That's heavy shit, man.

"[DEFENDANT]: No, I should have just . . . I should just . . . walked away."

David Ward was a very close friend of defendant. On March 29, 2002, he received a letter from defendant. In it, defendant asked Ward to talk to Solorzano and to ask her, "[W]hy have [defendant] thrown in jail[?]," and "Why take two lives instead of one[?]" However, Ward never actually talked to Solorzano about this.

On September 16, 2004, while defendant was still in jail, he had a phone conversation with his wife, Sol Sanchez. In it, they said:

"SOL: All you care about is yourself

"[DEFENDANT]: . . . See[,] now you're acting like a fucking cop. You don't give a fuck about my name. "

They then said:

“[DEFENDANT]: . . . I didn’t have time to think.

“SOL: Yeah, . . . he was on the floor. You had already . . .

“[DEFENDANT]: No[,] he wasn’t.

“SOL: You had already won.

“[DEFENDANT]: No. Were you there? Do you know what the fuck happened?

. . . You believe a cop?

“SOL: Well[,] then[,] how come . . . all the bullets are from the back?

“[DEFENDANT]: Because . . . he had his hands around my waist. . . . He was trying to attack me and his hands were around my waist, that’s why.”

They also said:

“[DEFENDANT]: If I would’ve had time, I wouldn’t have did that. . . . Why would I do that, in front of people and with so many of my friends around, why would I do that? If I was thinking? . . . [¶] . . . [¶]

“SOL: Yeah, you don’t want him to tell you what to do.

“[DEFENDANT]: Do you like people telling you what to do? Some, somebody you don’t know tells you to go outside? Someone that you never met? What would you say? It ain’t even . . . somebody that lives there? . . . You’d say okay?”

C. *Defense Evidence.*

Solorzano had given a fellow employee several inconsistent accounts of the shooting.

II

ADMISSION OF DEFENDANT'S JAILHOUSE PHONE CALL WITH LYONS

Defendant contends that the trial court erred by admitting a taped telephone conversation between him and one Gary Lyons.

A. *Additional Factual and Procedural Background.*

The prosecution filed a motion in limine, seeking to introduce, among other things, a telephone conversation that took place between defendant and Gary Lyons on July 30, 2004, when defendant was in jail.

Defense counsel objected: “[W]e’re talking two years down the line after the young defendant has been in custody. I see a mass of bravado. I’m the big man[,] I’m this, I’m that, but I don’t see anything direct or substantial. I just see a bunch of puffing, heavy[-]duty puffing, if you will. I don’t see any admissions there. I don’t see any directions to do this or to do that to someone.

“He’s talking to . . . Mr. Lyons, . . . and it just . . . doesn’t bear on this case. If there is some other case that’s about to come up, that’s another case, but it’s not this case, your Honor.

“And, again, the prejudicial [e]ffect, . . . 35[2] prejudice far outweighs the probative value.”

The trial court overruled the objection. It cautioned, however, that “the People . . . must sit down with [defense counsel] and come up with what is relevant In other words, since I’m excluding gang evidence[, if] there is talk about . . . gang-related

matters, that that has to be excised . . . or anything else that may be irrelevant before we get to the playing of that or the questioning of a witness or anything of that nature.” The trial court added, “And if you have any problems, then that’s when I should address it later as to certain passages or something, okay?”

Both sides agreed upon a redacted version of the conversation. Before it was played, however, defense counsel asked the trial court to redact one additional portion, explaining that he had “missed that part.” The prosecutor agreed to the additional redaction. The redacted version of the conversation was then played for the jury, which was also given a transcript.

Defendant began the conversation by saying that he was going to “get at” someone named John Paul. He explained: “. . . I heard he’s running his mouth And it’s a trip how people know more about my case than me because I don’t even know this shit.” He added that John Paul “knows who the fuck I am, what the fuck I’m about. So he better keep his mouth shut and he better put his little bitch in check, otherwise . . . she can be touched.”

Defendant stated more generally that people who were “running their mouth” were “going to get . . . hurt.” He told Lyons, “So all these people running their mouth saying this and this and that about you, you need to go ahead and get busy. . . . And if I hear them say it in here, . . . I ain’t going to let it ride and you shouldn’t let it ride.”

Defendant observed, “[T]hat’s what will get you hurt. Dope, money, respect and broads, that’s what it’s all about. A broad will get you hurt. Dope will get you hurt.

Money will get you hurt and respect will get you hurt. These people want to be disrespecting and . . . they need to feel the consequences.”

Defendant then stated: “. . . I know people are making shit up because they don’t know. How are they going to know more about my case than I know[?] It ain’t going to happen. . . . [N]o one else knows. I kept my mouth shut.”

Defendant told Lyons: “Don’t let no one put you down. . . . You’re letting them keep you down. . . . Get your smash on. That’s all you’ve got to do. Smash on these mother fuckers. Smash them. If someone says that about someone in here[,] they’re getting whacked. . . . And don’t worry about that shit. I’ll sweat it. I’m telling you, and the only one that can do anything is me.”

Finally, defendant said: “There ain’t no one out there in our generation that smashes like me. Nobody. There ain’t no one put in the work I did. . . . [T]here ain’t no one that smashed like me. Ain’t no one that went on as many missions as me. Ain’t no one did what I did — nobody.”

The police officer who authenticated the phone conversation testified that he had initially listened to it because he was investigating Lyons in another case.

B. *Analysis.*

Preliminarily, we note that the only objection preserved for purposes of appeal was an objection to the entire conversation. (See Evid. Code, § 353, subd. (a).) The trial court gave defense counsel the option of objecting to any portions of the conversation that he deemed irrelevant or unduly prejudicial, but he failed to take advantage of this option

(aside from requesting one belated redaction, which was granted). Accordingly, the *only* issue before us is whether *any* portion of the conversation was admissible.

Defendant's comments that "respect will get you hurt" and that people who "want to be disrespecting . . . need to feel the consequences" were relevant to his motive. They demonstrated that, in his opinion, he should punish with physical harm any person who showed disrespect to him. This supported the prosecution's theory that defendant shot and killed the victim because the victim showed him disrespect; it also tended to rebut defendant's claim of self-defense.

In addition, the conversation revealed that defendant intended to retaliate against "John Paul" and other potential witnesses against him. "A threat against a witness is relevant as indicating consciousness of guilt. [Citations.]" (*People v. Foster* (1988) 201 Cal.App.3d 20, 25; accord, *People v. Slocum* (1975) 52 Cal.App.3d 867, 887 [Fourth Dist., Div. Two].)

Defendant argues that the conversation "related to some other case entirely," i.e., the case against Lyons. A police officer testified that he happened to listen to the phone conversation because he was investigating Lyons. Defendant, however, had no way of knowing that. To the contrary, in the conversation, he indicated that he was threatening the witnesses in his own case. For example, he stated, "[I]t's a trip how people know more about my case than me" He also stated, "[P]eople are making shit up because they don't know. How are they going to know more about my case than I know[?]"

Admittedly, defendant's advice to *Lyons* — that Lyons, too, should “smash” people who were “running their mouth” about him — was not particularly relevant to show *defendant's* consciousness of guilt. Even if it was relevant, it could be argued that it was prejudicial. Nevertheless, as we have already discussed, defense counsel forfeited any objection that applied solely to any particular portion of the conversation.

Finally, the trial court could reasonably find that, as evidence of defendant's motive and his consciousness of guilt, the conversation was more probative than prejudicial. Again, if defense counsel felt that certain portions of the conversation were unduly prejudicial, he could have asked that they be redacted. The trial court expressly made its ruling subject to such a request. We cannot say that it abused its discretion.

We therefore conclude that the trial court did not err by admitting defendant's conversation with Lyons.

III

JURY INSTRUCTION ON “AN ASSAULT WITH FISTS”

(CALJIC NO. 5.31)

Defendant contends that the trial court erred by instructing the jury, using CALJIC No. 5.31, that an assault with fists does not justify the use of a weapon in self-defense unless the person assaulted reasonably believes that the assault is likely to inflict great bodily injury.

A. *Additional Factual and Procedural Background.*

The prosecutor asked the trial court to give CALJIC No. 5.31, which provided: “An assault with fists does not justify the person being assaulted in using a deadly weapon in self-defense unless that person believes and a reasonable person in the same or similar circumstances would believe that the assault is likely to inflict great bodily injury upon him.” (Brackets omitted.)

Defense counsel objected: “[W]e’re using CALCRIM.^[1] And I think we should stick to CALCRIM. And I think that is not mentioned in CALCRIM in any way, shape, or form. It zero[e]s in on one specific way, because fists were involved here. And it’s completely prejudicial and serves no probative value. It could sway a jury regarding fists. Because sometimes fists are justified to react with a deadly weapon.” He further objected that the instruction was “bad law.”

The trial court overruled the objection and gave the instruction.

B. *Analysis.*

Defendant argues that the instruction was erroneous because “a deadly weapon *may* be used to defend against an assault with fists.” (Bolding omitted.) Technically, that is true — but only if, as the instruction correctly stated, the assault with fists reasonably appears likely to result in great bodily injury. (*People v. Caldaralla* (1958) 163 Cal.App.2d 32, 47; *People v. Albori* (1929) 97 Cal.App. 537, 542-543; see also Pen.

¹ Judicial Council of California Criminal Jury Instructions.

Code, § 197, subds. 1, 3.) Even the cases that defendant cites — *People v. Emrick* (1918) 38 Cal.App. 36, 38-39 and *People v. McDonnell* (1917) 32 Cal.App. 694, 700 — support this proposition. It is simply a specific application of the more general principle that “any right of self-defense is limited to the use of such force as is reasonable under the circumstances. [Citation.]” (*People v. Pinholster* (1992) 1 Cal.4th 865, 966.)

Defendant also argues that CALJIC No. 5.31 was not intended to be used in homicide cases. He notes that it was contained in a section of CALJIC entitled, “Non-Homicidal Defense of Self or Other.” (Capitalization omitted.) Nevertheless, it is a correct statement of the law relating to self-defense that applies equally to homicide cases.²

Next, defendant argues that CALCRIM No. 505, which the trial court also gave, “contains a provision similar to, but more legally accurate than, CALJIC No. 5.31” That instruction, as relevant here, provided that self-defense would apply only if, among other things, “[d]efendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury,” and “defendant used no more force than was reasonably necessary to defend against that danger.” Admittedly, this did cover the same point, albeit in a more general way. Thus, if the trial court had refused to give CALJIC No. 5.31, it would not have erred. Still, it was not required to refuse the instruction. “So

² The same point is covered for use in homicide cases in more general terms, without specifically referring to an assault with fists, in CALJIC Nos. 5.10, 5.12, 5.13, 5.14 and 5.16.

long as the instruction is otherwise proper, no right of the defendant is infringed by allowing the prosecutor to request an instruction which focuses a jury on factors which are relevant to its determination of the issues for decision.” (*People v. Carter* (1993) 19 Cal.App.4th 1236, 1253, fn. 11.)

Defendant also argues that it was error to give a CALJIC instruction together with CALCRIM instructions. He cites the CALCRIM usage guide, which provides: “The CALJIC and CALCRIM instructions should *never* be used together. While the legal principles are obviously the same, the organization of concepts is approached differently. Trying to mix two sets of instructions into a unified whole cannot be done and may result in omissions or confusion that could severely compromise clarity and accuracy.” (Judicial Council of Cal. Crim. Jury Instns. (2007-2008), Guide for Using etc., p. xxvi.) While this is undoubtedly good cautionary advice, it is not the legal standard by which we review jury instructions. We must look to whether there was any actual omission, confusion, or inaccuracy; a theoretical potential is not enough.

Defendant therefore asserts that combining CALJIC No. 5.31 with CALCRIM instructions was, in fact, confusing. Once again, however, CALJIC No. 5.31 merely stated a special case of the general principle already stated in CALCRIM No. 505. Hence, we see neither the potential for confusion nor any actual confusion.

He argues that CALJIC No. 5.31 may have prevented the jury from considering the applicability of imperfect self-defense. Not so. The jury was instructed that “perfect” self-defense required both an actual and a reasonable belief in the need to use deadly

force to prevent death or great bodily injury, and that it “justified” both murder and manslaughter. (CALCRIM No. 505.) In this context, it was then given CALJIC No. 5.31, which further specified that “[a]n assault with fists does not *justify* the person being assaulted [in] using a deadly weapon in self-defense unless that person believes and a reasonable person in the same or similar circumstances would believe that the assault is likely to inflict great bodily injury upon him.” (Italics added.) Thereafter, it was instructed that imperfect self-defense required an actual but *unreasonable* belief in the need to use deadly force to prevent death or great bodily injury and that it would reduce what would otherwise be murder to manslaughter. (CALCRIM No. 571.) We see no reasonable possibility that the jury would have understood CALJIC No. 5.31 to apply to imperfect self-defense.

Finally, defendant argues that the prosecutor’s closing argument was misleading on this point. The prosecutor stated: “An assault with fists does not justify an assault with a deadly weapon. That’s old school. That’s stuff we grow up with. If you’re going to get in a fight, if it involves fists, you’re just going to brawl it out. We were always taught when we were young it’s the cowards that get up, run back, grab a stick, grab a knife, and then escalate the fight. This fight was about fistfighting. And it got escalated real quick to a lethal form of fighting by the defendant. And this instruction just codifies or embodies what our common sense tells us. You don’t get to bring a gun to a fistfight.” Assuming, without deciding, that this argument was misleading, defense counsel forfeited

any such misconduct by failing to object and request an admonition. (*People v. Wilson* (2008) 44 Cal.4th 758, 799.)

We therefore conclude that the trial court did not err by instructing the jury with CALJIC No. 5.31.

IV

DISPOSITION

The judgment is affirmed.

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/s/ RICHLI
Acting P. J.

We concur:

/s/ GAUT
J.

/s/ MILLER
J.